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No. 84-1471

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,
Petitioner,
VS.
DORIS ELSWORTH, et al., MILDRED BEST, et al.,
SANDRA DUNAWAY, et al., and JO ANN MIRO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTION PRESENTED FOR REVIEW

Can the petitioning aircraft manufacturer assert "the preemption doctrine" to avoid paying the responding pilot's and passengers' heirs' judgment for wrongful death damages unanimously affirmed en banc by the California Supreme Court where the judgment was entered on a general jury verdict based on five different theories of products liability including a negligent design theory using a negligence per se jury instruction authorized by a state statute and supported by five federal air safety regulations simply because sixteen years prior to the fatal aircrash the Civil Aeronautics Administration spot-checked compliance with just one of the five regulations under conditions dissimilar from those encountered by the accident aircraft?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

SUMMARY

Respondents and passengers' heirs DORIS ELSWORTH, et al., MILDRED BEST, et al., and SANDRA DUNAWAY, et al., ("passengers' heirs") believe that the unanimous en banc decision of the California Supreme Court affirming their judgment for wrongful death damages should not be altered and no writ of certiorari should issue because petitioner and aircraft manufacturer BEECH AIRCRAFT CORPORATION ("Beech"), has not demonstrated "special and important reasons therefor." U.S.S. CT. Rule 17.1. Because Beech has obtained a stay of enforcement of judgment from the trial court, passengers' heirs pray that this Court end their eleven years of financial hardship by denying the unfounded petition as fast as possible.

CONSTITUTIONAL PROVISIONS APPLICABLE

In addition to U.S. CONST. Art. VI cl. 2, this case involves:

U.S. CONST. Tenth Amendment (1791)

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively, or to the people."

STATUTES INVOLVED

This case involves 49 U.S.C. §1506 (1958) which provides:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

It also involves CAL. EVID. CODE §669 (1967) which codifies the common law doctrine of negligence per se. See, footnote 1 at 1a-2a of the petition appendix.

COUNTERSTATEMENT OF THE CASE

The Fatal Aircrash

Eleven years ago on Father's Day, June 16, 1974, pilot Edward Miro of Miro Aviation flew passengers Richard Elsworth, Robert Best and Neldon Dunaway in a Travel Air twin-engine aircraft designed and manufactured by petitioner Beech. At some point Mr. Miro turned off the left fuel selector, shut down the left engine and feathered the left propeller blades. This procedure was proper in the event of engine malfunction. Whatever his reason, feathering the propeller and shutting off the left engine did not affect the stall/spin characteristics of the aircraft under foreseeable single-engine flight. The passengers' first and

only contact with the Beech Travel Air lasted just seven minutes. All four men died when the Beech Travel Air stalled and spun to the ground in a flat spin.

The Reasons Underlying the General Verdict in Favor of the Heirs Misstated by Beech

The petition understates respondents' contentions at trial. The wives and children of the four decedents filed wrongful death actions against Beech based on five different theories of liability, *i.e.*, negligent testing, negligent design, defective design, negligent failure to warn and defective failure to warn. Respondents contended that:

a. BEECH negligently tested its Travel Air aircraft prior to manufacture of the one which crashed;

b. The Travel Air landing configuration stall speed is 71.7 mph not under 70 mph as reported by BEECH;

c. The single-engine rate of climb is minus 50 feet per minute not at least plus 102.8 feet per minute as required by Civil Air Regulation (CAR) 3.85(b) for aircraft with landing configuration stall speeds in excess of 70 mph;

d. The BEECH Owners Handbook contains no information on single-engine airspeeds at stall;

e. The BEECH Owners Handbook fails to inform the pilot at which altitudes the single-engine stall speed will be encountered before the single-engine minimum control speed;

f. BEECH Owners Handbook contains no information on single-engine minimum control speeds;

g. The stall warning light and horn do not give the pilot at least 5 and not more than 10 mph warning prior to stall as required by CAR 3.120(f);

h. The sound of the gear warning horn, which goes on when the propeller is feathered, masks the sound of the stall warning horn;

i. The BEECH Owners Handbook incorrectly states that the stall warning gives the pilot ample time to correct his attitude at all flight altitudes, weights and airspeeds;

j. The BEECH Owners Handbook incorrectly describes the single-engine flight and handling characteristics as "excellent;"

k. Once the Travel Air stalls during single-engine flight, the aircraft suddenly and abruptly rolls and yaws into a classic spin entry before the surprised pilot can avoid the spin, which undue spinning tendency violates CARs 3.123 and 3.124;

l. The BEECH Owners Handbook contains no warning concerning the single-engine stall/spin characteristics of the aircraft;

m The exceptional degree of skill and alertness required to avoid a fully developed spin and to effectuate spin recovery violates CAR 3.106; and

n. The spin recovery technique in the BEECH Owners Handbook is dangerously inaccurate, as BEECH later acknowledged.

The trial lasted four months. The jury deliberated two weeks before returning a general verdict awarding damages to all of the heirs.

Jurisdictional Defects: Beech's Failure to Preserve Issues for Review

The petition quotes misleading excerpts of respondents' counsel's closing trial argument taken out of context. At

trial Beech did not object to this argument and request that the jury be admonished. Beech thus waived any objection to those remarks. *Warner Construction Co. v. City of Los Angeles,* 2 Cal.3d 285, 302-3, 85 Cal. Rptr. 444 (1970). *See* 13a.

Beech never claimed that any of the heirs' five theories of liability were improper. Confronted with abundant evidence supporting the verdict, Beech never claimed that the verdict was not supported by substantial evidence. Beech also did not claim that the jury awarded excessive damages.

On appeal, Beech challenged only the "violation" element of BAJI 3.45, the standard negligence per se jury instruction mandated by CAL. EVID. CODE §669, originally claiming that federal "primary jurisdiction" barred its use. Because Beech did not offer an accurate alternate instruction at trial, its appeal was limited to whether giving BAJI 3.45 as applied only to the heirs' neglect design theory constituted a miscarriage of justice. CAL. CONST. ART. VI §13. In a brief before the California Supreme Court, however, Beech correctly conceded that federal regulation does not occupy the field of air safety. *See, e.g.,* 49 U.S.C. §1506. Contrary to its present petition, Beech cannot resurrect that argument before this Court. *Erie Railroad Co. v. Purdy,* 185 U.S. 148, 153-4 (1902).

Essential Facts About the Travel Air Certification Misstated by Beech Which Change the Nature of the Legal Issues

The petition presents an inaccurate and misleading history of the Travel Air certification. The evidence adduced at trial established that Beech employees tested, inspected and kept all records regarding the Travel Air under the "Delegation Option." The Civil Aeronautics Administration ("CAA") only issued the certificate. It is uncontested that Beech manufactured and certified the accident aircraft on July 24, 1958, without proper flight tests. The CAA later told Beech:

> "[I]n the request for issuance of a type certificate for the airplane, it was certified that the airplane complied with the applicable airworthiness requirements when in fact, you had not determined that it complied with this particular regulation [CAR 3.124(a)]. Under these circumstances, in so certifying, you failed to discharge the responsibility placed upon you by Part 410 of the Regulations . . . Your performance, in this case, is less than we believe reasonable to expect from a manufacturer to whom the privileges of the Delegated Option has been granted."

Absent the required testing the CAA had no authority to issue a type certificate. 14 C.F.R. §§21.231-21.293.

On August 8, 1958, after another fatal aircrash, Beech flight-tested the Travel Air for compliance with CAR 3.124(a) only, not the other 4 CARs at issue. The CAA representative flew in a chase plane where he could not observe how Beech's test pilot manipulated the aircraft controls. As the test conditions indicate, he only "spot checked" compliance with CAR 3.124(a). None of the flights tested the aircraft's ability to recover from fully developed spins (*i.e.*, two or more turns). Performed at 12,000 feet pressure altitude, none of the flights demonstrated the aircraft's performance under foreseeable true asymetric power conditions. A Beech Safety Communique later admitted:

> "If . . . the airplane is allowed to become fully stalled while one engine is providing lift-producing thrust, a rapid rolling and yawing motion may develop even against full aileron and rudder, resulting in the airplane becoming inverted during the onset of a spinning motion."

Contrary to the petition, no means existed to challenge the certification on July 24, 1958, or when Beech flight-tested the Travel Air on August 8, 1958, because 49 U.S.C.

§1486(a) did not become effective until December 31, 1958. In July of 1958, one of the passengers' heirs had not yet been conceived and another was only eight years old. Their decedents would have no contact with the aircraft until their fatal seven minute flight almost sixteen years later. Contrary to the petition, the heirs sought compensatory damages for the deaths of their decedents, not the decertification or grounding of the aircraft wreckage. Contrary to the petition, the heirs sought to complement the CAA/FAA air safety efforts not to supplant or "second-guess" them.

The Unanimous En Banc California Supreme Court Opinion Reaching A Right and Fair Result

The three judge panel of the California Court of Appeal which decided this case included one judge who admitted during oral argument that he had previously worked for the FAA. Its opinion mischaracterized the heirs' objections to the aircraft's stall/spin characteristics, ignored their failure to warn claims and misstated the laws. Its flawed opinion became a nullity once the California Supreme Court granted the heirs' petition for hearing. *Krouse v. Nimocks*, 6 Cal. 2d 482, 483, 66 P. 2d 438 (1937).

The main issue presented by the petition for hearing was: "Can a federal airsafety regulation support a negligence per se jury instruction in a California products liability action?" Sitting en banc the California Supreme Court unanimously affirmed the heirs' judgment for compensatory damages in a well-reasoned opinion authored by Justice Stanley Mosk. That opinion reached a right and fair result.

REASONS FOR DENYING THE WRIT

I.

THE CALIFORNIA SUPREME COURT'S UNANIMOUS EN BANC OPINION ALLOWING USE OF FEDERAL AIR SAFETY REGULATIONS TO SUPPORT A NEGLIGENCE PER SE JURY INSTRUCTION MANDATED BY STATE STATUTE DID NOT WRONGLY DECIDE ANY FEDERAL QUESTION.

Essentially, the California Supreme Court's unanimous en banc opinion held that a negligence per se jury instruction mandated by CAL. EVID. CODE §669 could be supported by federal air safety regulations. It is not the function of this Court to construe a state statute contrary to the construction given to it by the highest Court of the State. *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Moreover, it is not the practice of this Court to reach out to decide constitutional issues where none exist. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

In the area of preemption "each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973). The Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958, explicitly provide that the administrative remedies provided by the federal scheme are not exclusive. 49 U.S.C. §1506. The 1958 Act adopts the 1938 Act verbatim. The legislative history of the 1938 Act does little to elucidate this provision. The Conference Report merely states:

> "§1010 REMEDIES NOT EXCLUSIVE. This section, Section 1104 of the Senate bill, and Section 1106 of the Conference agreement are identical."

S. REP. NO. 2635, 75th Cong., 3d Sess. 78 (1938). The House Report does not mention §1010. H.R. Rep. No. 2254,

75th Cong., 3d Sess. 11 (1938). The Senate Report does not discuss §1104. S. REP. No. 1161, 75th Cong., 3d Sess. 2 (1938). "The suggestion was made in 1938 that Federal regulation of civil aviation be exclusive. Senator McCarran, one of the authors of the Civil Aeronautics Act, said he had this in mind himself, but 'he did not want to become a revolutionary with one stroke.' Hearings on S. 3659 before Subcommittee of Senate Committee on Commerce, 75th Cong., 3d Sess., at 100 (1938)." A. F. Lowenfeld, AVIATION LAW (2d ed. 1981) §3.31 at 3-162n.a. Thus, state law has always governed aviation accidents. *Id.* §1.31. "None of this was inevitable. Compensation for aviation accidents could, for instance, have been governed by federal law, as are virtually all other aspects of commercial aviation in the United States." *Id.* at 6-7. Federal regulation does not occupy the field. *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338, 1345 (W.D. Pa. 1982); *Ravreby v. United Airlines, Inc.*, 293 N.W. 2d 260 (Iowa 1980).

Concurrent jurisdiction is always presumed absent clear incompatibility and even if exclusive jurisdiction exists a state court will usually be allowed to decide a federal question collaterally. *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982). Beech concedes that at best the determination at issue was collateral. The CAA/FAA can only "spot check" the manufacturer's work. *United States v. S.A. Empressa de Viaco Aerea Rio Grandense*, ____ U.S. ____, 104 S. Ct. 2755, 81 L. Ed. 2d 660, 676 (1984). "[T]he duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer . . . ." *Id.*

> "It is essential that [those who build aircraft and component parts for general aviation] as well as aircraft operators, be ever conscious that a plane is an inherently dangerous and sensitive instrumentality which can cause harm if high standards of care are relaxed.

> The complex and exacting scheme of regulation developed by the FAA to this end must be reinforced and strengthened by courts called on to develop rules of liability and damages in situations like the instant case where it is apparent that high standards consistent with the regulatory scheme have not been maintained with resulting injury to persons and property."

Fischer v. Bell Helicopter Co., 403 F. Supp. 1165, 1174 (D.D.C. 1975).

Because Beech certified its Travel Air aircraft under the "Delegation Option" with Beech employees performing all regulatory functions except signing the certificate, no independent agency expertise is present in this case. On the facts, Beech did not even test the aircraft before requesting certification. As the court stated in *Johnson v. Steam-Gauge Lantern Co.*, 25 N.Y.S. 689, 692 (Sup. Ct. 1893): "[a] certificate could not operate to convert an obviously unsafe landing into a safe one."

Because Beech concedes that the heirs have valid negligence and strict liability causes of action and because the heirs do not seek a mandatory injunction requiring changes in the aircraft, uniformity is not at issue. Beech admits that a state court can allow damages where an aircraft manufacturer requires more than the minimum required by the CARs. Here, the heirs' use of the CARs with their negligence per se jury instruction did not interfere with the federal regulatory scheme. 49 U.S.C. §1506 specifically allows such use.

In contrast, the rule now urged by Beech hands aircraft manufacturers a complete defense to all products liability litigation. This result is particularly inappropriate because the high degree of regulatory agency control and delegated regulatory authority effectuated by these manufacturers al-

ready gives them undue insulation from responsibility for their actions. Certainly, Congress never intended such a perverse result. The unanimous en banc opinion of the California Supreme Court prevents aircraft manufacturers from using federal air safety regulations as a shield from liability rather than as a guide to safety.

II.

THE ALLEGED CONFLICTS ARE ILLUSORY

Beech concedes that no comparable decisions have been made by any state court of last resort. The alleged conflicts with decisions of this Court and federal courts of appeals are illusory.

In *Silkwood v. Kerr-McGee,* ____ U.S. ____, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) the Nuclear Regulatory Commission investigated twice and found no violation of Atomic Energy Commission safety regulations before or after the contamination of Karen Silkwood. 104 S. Ct. 470n. 4. Yet, the *Silkwood* plaintiffs provided convincing contrary expert testimony at trial and received a jury verdict in their favor. This Court let the *Silkwood* plaintiffs recover damages based on the defendant's violation of federal standards despite extensive regulation of the nuclear power industry, finding no conflict. 104 S. Ct. 626. All nine justices agreed that the extensive federal safety regulations did not bar plaintiffs' compensatory damages. "There is no element of regulations when compensatory damages are awarded . . . ." 104 S. Ct. 469n. 3, Powell, Burger & Blackman dissent. "Whatever compensation standard a state imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme." 104 S. Ct.

462, Blackman & Marshall dissent. The parallels to this case are obvious and the California Supreme Court's analysis of *Silkwood* is accurate. 7a-10a. No conflict exists.

Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) is clearly distinguishable as the California Supreme Court opinion explains in footnote 6. 8a. The same reasoning distinguishes *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F. 2d 380 (9th Cir. 1953). The heirs sought compensatory damages for the four wrongful deaths, not sanctions against Beech based on subsequent Travel Air flight hours.

Roshenhan v. United States, 131 F. 2d 932 (10th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943) provides no contrary authority. In *Roshenhan* the aircraft had only a state airworthiness certificate and the court held: "The [Civil Aeronautics] Act does not textually recognize a state certificate with its requirements, and we cannot presume a Congressional intent to do so." *Id.* at 935. No state certificate is at issue here.

Further, no federal certificate is at issue here either. The heirs seek only compensatory damages for the four wrongful deaths. The heirs do not seek to declare any federal regulations invalid or to decertify or ground any aircraft or to enjoin any certification or to mandate any aircraft equipment. Beech's references to such cases are inappropriate. *See, Gaunce v. deVincentis*, 708 F. 2d 1290 (7th Cir. 1983) (airman's certificate at issue); *O'Donnell v. Bond*, 510 F. Supp. 925 (D.D.C. 1981) (adequacy of regulations challenged and aircraft grounding sought); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) (action to enjoin issuance of banking certificate). Even if 49 U.S.C. § 1486(a) (Dec. 31, 1958) had been effective on July 24, 1958, when Beech certified the accident aircraft, it would have posed no bar because the heirs did not

seek to void the CAA order itself. *See, Local 533, Transport Workers Union v. Eastern Air Lines, Inc.*, 544 F. Supp. 1315, 1333 (S.D.N.Y. 1982), *modified on other grounds*, 695 F. 2d 668 (2d Cir. 1982).

As for *Campos v. Puerto Rico Sun Oil Co., Inc.*, 536 F. 2d 970 (1st Cir. 1976), in that case the agency order had to be declared illegal for the plaintiff to recover damages. In contrast, here the heirs only sought to have Beech's conduct characterized as negligent per se, not illegal. The sole issue was the performance of the aircraft, not the validity of the type certificate.

The heirs' position is not novel. Other cases hold that federal regulations may supply a state standard of care. *See, e.g., Heckel v. Beech Aircraft Corp.*, 467 F. Supp. 278, 281 (W.D. Pa. 1979); *Diamond v. Grow*, 243 Cal. App. 2d 396, 399, 52 Cal. Rptr. 265 (1966). Other cases hold that the federal air safety regulations can support negligence per se instructions. *See, e.g., McGee v. Cessna Aircraft Co.*, 139 Cal. App. 3d 179, 185-7, 188 Cal. Rptr. 542 (1983); *Lightenburger v. United States*, 298 F. Supp. 813, 838, *rev'd on other grounds*, 460 F. 2d 391 (9th Cir.), *cert. denied*, 409 U.S. 983 (1969); *Rudelson v. United States*, 431 F. Supp. 1101, 1107 (C.D. Cal. 1977), *aff'd*, 602 F. 2d 1326 (9th Cir. 1979); *Todd v. United States*, 384 F. Supp. 1284, 1294 (M.D. Fla. 1975), *aff'd*, 553 F. 2d 384 (5th Cir. 1977); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F. 2d 62 (D.C. Cir. 1955), *rev'd on other grounds*, 350 U.S. 907 (1955). *Gatenby v. Altoona Aviation Corp.*, 407 F. 2d 443 (3d Cir. 1968). Admittedly, only *McGee* addresses aircraft manufacturers, but to allow negligence per se instructions only as against pilots and air traffic controllers in an age of comparative fault and crashworthiness cases would create an unfair imbalance. Allowing federal air safety regulations to support a negligence per se jury instruction in a California products liability action creates no conflict with opinions of this

Court, federal courts of appeals or state courts of last resort. Having been properly decided by the California Supreme Court the issue requires no further action by this Court.

CONCLUSION

For the reasons stated above and those stated in the opposition of the pilot's heirs respondent passengers' heirs respectfully submit that petitioner has failed to sustain its burden of establishing the "special and important reasons" for granting the writ of certiorari as required by U.S.S. CT. Rule 17.1 (1984). No question of law at issue justifies granting the writ. No conflict of law exists to resolve by granting the writ. To alleviate their financial hardship respondent passengers' heirs pray that this Court deny the unfounded petition quickly so that their judgment for compensatory damages for the wrongful deaths of their families' sole breadwinners may be enforced.

Respectfully submitted,

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